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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. [redacted] 4 [redacted] 5

IN THE MATTER OF GRIGSBY-GRUNOW COMPANY,
BANKRUPT.

FRANK M. McKEY, TRUSTEE IN BANKRUPTCY,
Petitioner,

vs.

MAURICE PARADISE, AS TRUSTEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
of Washington, D. C.,
Counsel for Petitioner.

A. L. SCHAPIRO,
B. C. SCHIFF,
of Chicago, Illinois,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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MAURICE PARADISE, AS TRUSTEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Frank M. McKey, as Trustee in Bankruptcy of the Grigsby-Grunow Company respectfully prays that a writ of certiorari issue to the Circuit Court of Appeals for the Seventh Circuit to review decrees of that court entered December 7, 1935 reversing a decree of the United States District Court for the Northern District of Illinois, Eastern Division. A certified transcript of the record in the case, including the proceedings in said Circuit Court of Appeals is furnished herewith in accordance with Rule 38, Paragraph 1 of the rules of this Court.

Statement of Matters Involved.

The Grigsby-Grunow Company was adjudicated a bankrupt on March 13, 1934 and Frank M. McKey, the petitioner herein was duly elected and qualified as trustee in bankruptcy on April 16, 1934, and the bankruptcy estate is now under liquidation.

On June 29, 1934 Maurice Paradise, as Trustee for approximately three thousand former employees of the Grigsby-Grunow Company, the respondent herein, filed in said bankruptcy proceeding a certain petition designated "Petition for Allowance of Preferred Claims" (R. 2-6) to which petition an answer was filed by Frank M. McKey, Trustee in Bankruptcy on July 27, 1934 (R. 7-11) which in substance denied that said claim was entitled to priority of payment within any of the provisions of the Bankruptcy Act.

On October 16, 1934 a stipulation of facts was entered into between the parties (R. 12-15) and filed in said bankruptcy proceeding.

Thereafter hearings were had before the Referee in Bankruptcy to whom the bankruptcy estate was generally referred and on December 14, 1934 said Referee entered an order allowing the said petition of Maurice Paradise, as Trustee and directing your petitioner to pay the said Maurice Paradise, as Trustee the sum of Fourteen Thousand Six Hundred Seven Dollars and Fifty-one Cents ($14,607.51) (R. 16-17).

A petition for review was filed with said Referee in Bankruptcy who certified the proceedings to the District Court, the Honorable John P. Barnes, District Judge presiding (R. 18-19) and thereafter proceedings were had before said District Judge on said petition for review which resulted in an order being entered on March 28, 1935 re-

versing the order of the Referee and allowing the petition of Maurice Paradise, as Trustee, to stand as a general claim against the bankruptcy estate (R. 20-21) from which order two appeals were taken to the Circuit Court of Appeals for the Seventh Circuit, one as a matter of right, and the other with the consent of said Circuit Court of Appeals, which two appeals were later consolidated in said Circuit Court of Appeals by order of said Court (R. 27-28).

Thereafter on December 7, 1935 decrees were entered in said Circuit Court of Appeals reversing the decree of the District Court with directions to enter one in accordance with the views expressed in the opinion of said court (R. 40-49), the effect of which, if permitted to stand, would be to allow to Maurice Paradise, as Trustee, a prior claim in the sum of Fourteen Thousand Six Hundred Seven Dollars and Fifty-one Cents ($14,607.51).

While the facts have been stipulated to and appear at length in the record (R. 12-15) the following is a brief resume of the facts leading up to the controversy herein.

On February 4, 1933 and prior thereto, the Grigsby-Grunow Company maintained in connection with its business an unincorporated organization known as the "Majestic Employees' Welfare Association", which had been formerly known as the "Majestic Welfare and Athletic League". The Association's purpose was to provide life, health and accident insurance for the benefit of the employees of the bankrupt and their dependents. The Association was governed by its own officers and directorate and maintained its own account in The First National Bank of Chicago. The funds of the Association were invested exclusively in obligations of the United States Government, and the earnings and increment of these investments were used for the insurance benefits contemplated by the Association's constitution and by-laws.

The membership of the Association was comprised exclusively of employees who had been employed for thirty (30) days or more and who had paid the initial fee of One Dollar ($1.00) to the treasury of the Association. The initial fee was automatically deducted by the Grigsby-Grunow Company from the amount due as salary or wages of each employee employed for the required period. In addition to the initial fee there were weekly dues of Twenty-five Cents ($.25) per week which were likewise automatically deducted by the Grigsby-Grunow Company from the amount due each member as salary or wages.

Prior to February 4, 1933 the Grigsby-Grunow Company regularly paid the Association by check, which was deposited in the Association's treasury, the accumulations of each payroll deduction, less deductions for expenses of the Association paid by the Grigsby-Grunow Company.

Commencing with February 4, 1933, however, the Grigsby-Grunow Company began to fall in arrears and from that time until November 24, 1933 when receivers in equity were appointed for the Grigsby-Grunow Company (who were later superceded by the receiver and trustee in bankruptcy) there was always a balance to the credit of the Association, which the Grigsby-Grunow Company had not paid to the Association. On November 24, 1933 said balance was in the sum of Fourteen Thousand Six Hundred Seven Dollars and Fifty-one Cents ($14,607.51).

The deductions of Twenty-five Cents ($.25) per week, including deduction for the initial fee, were made by charging the employees' account on the payroll records of the Grigsby-Grunow Company and crediting the aggregate of all such deductions to the account of the Majestic Employees' Welfare Association on the books of the Grigsby-Grunow Company.

No actual money was taken from the payroll envelopes

of the employees and deposited in any account of the Grigsby-Grunow Company, but to the contrary the matter was handled as a mere bookkeeping entry, and at no time did the Grigsby-Grunow Company segregate any money due the Majestic Employees' Welfare Association or deposit any money in any separate trust account or bank account.

On November 24, 1933 the aggregate balances in all bank accounts of the bankrupt exceeded the amount claimed and at all times from February 4, 1933 to November 24, 1933 the total of daily balances of all the accounts exceeded the amount claimed. However, the general account of the bankrupt had during the period been reduced by withdrawals to a low point on September 23, 1933 to Four Thousand Three Hundred Five Dollars and Thirty Cents ($4,305.30) (R. 15).

On or about August 12, 1933 the Majestic Employees' Welfare Association was formally dissolved and disbanded and its assets were taken over by the Majestic Works Council, which like the Association, was an unincorporated organization in which the bankrupt and its employees had equal representation.

After the equity receivers had been appointed, but before these bankruptcy proceedings were instituted the Majestic Works Council disbanded, but before disbanding authorized Maurice Paradise to act as trustee for the employees to collect the amount alleged to be owing from the Grigsby-Grunow Company, and it was in this capacity that the claim was filed in these proceedings.

It was further stipulated that no part of the Fourteen Thousand Six Hundred Seven Dollars and Fifty-one Cents ($14,607.51) claimed represented wages earned within three months before the date of the commencement of court proceedings (R. 39).

REASONS FOR GRANTING THE WRIT.

I.

The decision of the court below in this case has decided a federal question in a way probably in conflict with applicable decisions of this Court.

II.

The court below has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

III.

The court below has decided an important question of local law in conflict with the decisions of the Supreme Court of Illinois in *Bayor* v. *American Trust & Savings Bank*, 157 Ill. 62, and *Colegrove & Co. Bank* v. *Gaupp*, 357 Ill. 499.

IV.

The court below has rendered a decision in probable conflict with the decisions of the Circuit Court for the Eighth Circuit in the cases of *Southern Bell Telephone & Telegraph Company* v. *R. B. Caldwell*, 67 F. 2d 802, and *Burton Coal Co.* v. *Franklin Coal Co.*, 67 F. 2d 796.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, sitting at Chicago, Illinois, commanding said court to send to this court on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals

had in this cause, to the end that this cause may be reviewed and determined by this Court; that the orders of the Circuit Court of Appeals for the Seventh Judicial Circuit reversing the decree of the District Court be reversed and remanded; and that the petitioner be granted such other and further relief as may seem proper.

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
Counsel for Petitioner.

A. L. SCHAPIRO,
B. C. SCHIFF,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

I.

OPINIONS BELOW.

The opinion of the District Court has not been officially reported but is printed in full in the record (R. 20).

The opinion of the Circuit Court of Appeals is reported in 80 F. 2d 478 (R. 40).

II.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240-A of the judicial code as amended by the act of February 13, 1925. (28 U. S. C. A. Sec. 347-A).

The date of the decrees of the Circuit Court of Appeals for the Seventh Circuit (R. 48-49) sought to be reviewed was December 7, 1935.

III.

STATEMENT OF THE CASE.

The facts have been fully set forth under the caption "Statement of Matters Involved" which is hereby adopted.

IV.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred—

a. In holding that a trust relationship existed between the Grigsby-Grunow Company and the Majestic Employees Welfare Association, or the successors of said Majestic Employees Welfare Association.

b. In holding that a mere "indebtedness or liability to account" could be the subject of conversion.

c. In holding that the creation of an "indebtedness or liability to account" by mere bookkeeping entries such as the debiting of one set of accounts and the crediting of another account on the books of the bankrupt, could be the subject of a trust or establish a trust fund which could be traced or identified.

d. In holding that the claim of Maurice Paradise, as Trustee was entitled to priority of payment.

e. In not following the federal rule of "augmentation of assets" as applied to estates of insolvents.

f. In reversing the decree of the District Court.

SUMMARY OF ARGUMENT.

I.

The relationship of debtor and creditor between employer and employee existing at the inception of the transactions in question persisted throughout, notwithstanding the failure of the bankrupt company to carry out its promise to pay to the welfare association a sum equivalent to amounts charged against the employees.

II.

A transfer of funds by mere bookkeeping entries, such as the debiting of a number of accounts and the crediting of other accounts without segregation of some specific or identifiable property, does not create a fund which can be traced or which can be said to augment the assets of an estate coming into the hands of a trustee in bankruptcy.

III.

In bankruptcy proceedings if a claim for priority of payment does not come within the provisions of Section 64 (b) of the Bankruptcy Act, the claimant is not entitled to a prior claim unless he can establish that property belonging to him came into the estate and is traceable into the hands of the trustee in its original or substituted form.

ARGUMENT.

I.

THE DECISION OF THE COURT BELOW IN THIS CASE HAS DECIDED A FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Circuit Court of Appeals in this case appear to have predicated their decision on the theory (a) that the bankrupt was guilty of a conversion of property of its employees and, therefore, stood in the position of a trustee *ex maleficio*, and proceed to allow priority to the claimant because (b) "the record shows that there were at all times sufficient moneys in the bank deposits of the bankrupt to pay the amount due the welfare association" (R. 44). This decision is in direct conflict with the decision of this court in *St. Louis & S. F. R. Co.* v. *Spiller*, 274 U. S. 304-309; 71 L. E. 1060-67.

In *St. Louis & S. F. R. Co.* v. *Spiller*, 274 U. S. 304-309, 71 L. E. 1060-67, a railroad company had exacted illegal freight rates, which it was subsequently ordered to repay to the shipper. The Court of Appeals held that the railroad company became liable as trustee *ex maleficio* for the overcharges and that this liability was enforceable as upon a constructive trust, the only claim made that the money collected could be traced into the receiver's hands was that throughout the ten years which elapsed between the earliest exaction and the transfer of properties to the new company, the old one and the receiver had at all times in the several banks on which checks for various expenses were drawn, a working balance in the aggregate largely in excess of the shipper's claim. This court in passing upon said contention, in its opinion, on pages 309 and 310, held as follows:

"The assertion that the money collected can be

traced into the receiver's hands is confessedly without any support except the stipulated fact that throughout the ten years which elapsed between the earliest exaction and the transfer of the properties to the new company, the old one and the receiver had at all times in the several banks on which checks for current expenses were drawn, a working balance in the aggregate largely in excess of Spiller's claim. Such a showing fails to bring the present case within the rule by which, when trust funds are mingled with others, the *cestui* may assert an equitable lien upon the mingled mass to the extent of his contribution thereto." (Citing cases.)

"An illegal exaction does not impress an indelible trust upon all funds which the wrongdoer and his successors may thereafter have on deposit in their banks. For aught that appears all the money illegally exacted may have been spent for current operating expenses."

The decision of the Circuit Court of Appeals in this case also treated the arrangement of bookkeeping whereby the bankrupt credited the account of the welfare association and debited the payroll accounts of the employees as creating a fund which could be the subject of a trust (R. 44). This theory is also in direct conflict with the holding of this court in *Blakely* v. *Brinson*, 286 U. S. 254-263, 76 L. E. 1089-92, where this court held as follows:

"The cancellation of the credit balance by the debit neither suggests any intention to establish a trust nor points to any identifiable thing which could be the subject of it."

II.

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF GENERAL LAW IN A WAY PROBABLY UNTENABLE OR IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

1. The Federal Courts have long followed the rule of "augmentation of assets" and have held that a transfer of funds by mere bookkeeping entries, without actual segregation, is not sufficient because it does not augment the assets of the estate and consists merely of a shifting of credits.

The stipulation of facts clearly shows that there never was a trust fund; that no money passed between the employees and the Grigsby-Grunow Company so that there was nothing that ever existed which could be commingled or be the subject of a conversion (R. 13).

In the case of *Mechanics' & Metals National Bank of City of New York* v. *Buchanan,* 12 F. 2d 891 (C. C. A. 8) a preferential claim against funds of the bank in the hands of a receiver was sought on a trust fund theory. In said case, as well as in the present instance, no payments in money were in fact made, the transactions being a mere bookkeeping transfer. Citing from page 892 the court held:

> "It is conceded that no payments in money were in fact made; therefore, the funds of the bank were not augmented in any way. The original notes were not taken up in whole or in part, but were left in the possession of appellant, which had no notice of the transaction prior to insolvency. A mere bookkeeping transfer was made which would have been effective perhaps if the bank had continued as a going concern, but by which the funds of the bank were in no respect augmented. It consisted merely of a shifting of credits on the books of the bank. The rule applicable is thus announced in *Beard* v. *Independent District of Pella City* (C. C. A. 8) 88 F. 375, 31 C. C. A. 562.
>
> It is indispensable to the maintenance by a *cestui que* trust of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver. The case made by appellant falls short of this requirement. Transactions upon which it relies consisted of a mere shifting of credits on the books of the insolvent bank. The assets of that bank were not increased thereby, nor were any funds set apart which, or any part of which, came into the hands of the receiver."

2. The better doctrine and that sustained by weight of authority, is that a trust fund can be followed and recovered

in bankruptcy only when it can be clearly traced and identified in some specific fund or property coming into the hands of a receiver or trustee in bankruptcy.

The law is well settled that even assuming a trust fund actually existed, before it can be followed and recovered in bankruptcy proceedings, it must be clearly traced and identified in some specific fund or property coming into the hands of the trustee in bankruptcy, and that the burden of proof in tracing said fund rests upon the claimant thereto.

These principles have been upheld in the following cases involving bankruptcy proceedings:

In the matter of J. Albert See, Bankrupt, 209 F. 172 (C. C. A. 2d).

In re McIntyre & Co., 185 F. 96 (C. C. A. 2d).

In re Newark Shoe Stores, Inc., 3 Fed. Sup. 293 D. C. Md.

These principles also find support in the decision of this court in *St. Louis & S. F. R. Co.* v. *Spiller,* 274 U. S. 304-309, 71 L. E. 1060-67, and in the case of *Harmer* v. *Rendelman,* 64 F. 2d. 422 (C. C. A. 4).

In the case of *Newark Shoe Stores, Inc.,* 3 Fed. Sup. 293, approximately three hundred (300) employees of the Newark Shoe Stores, Inc., a bankrupt, filed a prior claim in said bankruptcy proceedings, based upon deposits of Two Hundred Dollars ($200.00) which each of said employees had made with the bankrupt as security for the faithful performance of their duties and which amount was to be returned to them upon the termination of their employment. These deposits were collected over a period of fifteen years and were commingled with other deposits of the bankrupt. At no time were the aggregate balances of the combined bank accounts of the bankrupt less than approximately Sixty-eight Thousand Dollars ($68,000.00), more than enough to discharge the amount of all said deposit claims.

The employees contended that they were entitled to priority on either of two grounds—first, that the deposits were in the nature of trust funds to which the bankrupt company does not obtain any beneficial title, and—second, that the deposits were entitled to priority upon general equitable principles.

The court held that the deposits were in the nature of trust funds though not entitled to priority on so-called general equitable principles, but further held it would not necessarily follow that all or any of the deposits should be refunded. Quoting from the decision:

> "No deposit can be, unless at the present time, it is definitely traceable into one of the company's bank accounts, and only if it can be shown that such bank account has never been less than the amount of such deposit and that the funds in that account have come into the hands of the trustee in these bankruptcy proceedings." (Citing cases.)
>
> "The apparent hardship of the ruling herein announced is regrettable, but courts may not, without warrant, extend the clearly defined limitations of the Bankruptcy Act and create preferred creditors, in derogation of the rights of general creditors."

This decision was decided on authority of *St. Louis & S. F. R. Co.* v. *Spiller*, 274 U. S. 304-309, 71 L. E. 1060-67.

In the case of *Colegrove & Co. Bank* v. *Gaupp*, 357 Ill. 499, the Supreme Court of Illinois, in October, 1934, held as follows:

> "The right to reclaim a trust fund is founded on the right of the ownership of the fund on the part of the party claiming the same to have it restored to him by the party having possession of the fund. Such claim is not based upon the relationship of debtor and creditor or *tort feasor* but is bottomed solely on ownership. Therefore, to recover as a *cestui que* trust, the owner or beneficiary of the trust property must prove that the alleged trustee has, in fact, the property even though it be in an altered form. Failing in this the trust fails, and the claims, if there is any legal liability therefor

becomes merely one of compensation on the same plane as other general debts."

3. The decision of the court below in effect holds that where a constructive trust is created, that is a trust *ex maleficio*, all of the property of the trustee is charged with the claim of the *cestui que*. This theory is against the weight of authority, as will appear from an examination of *St. Louis & S. F. R. Co.* v. *Spiller*, 274 U. S. 304-309, 71 L. E. 1060-67, and the following cases:

In the case of *Spokane County* v. *First National Bank of Spokane*, 68 F. 979 (C. C. A. 9) the court held:

> "The owner of property entrusted to another, by whom it has been misapplied, is not entitled to a general lien upon the assets of the trustee for the value of such property, but can only follow the same so far as it can be traced, either in its original form or in other forms into which it has been converted."

In the case of *Burgoyne* v. *McKillip*, 182 F. 452-454 (C. C. A. 8) (Cert. denied 55 L. E. 605) the court held as follows:

> "Although a demand may be founded on a breach of trust, the entire estate of the recreant trustee is not thereby necessarily impressed with a trust."

In the case of *Samuel Little and others* v. *Joseph H. Chadwick and others*, 151 Mass. 109, the court held:

> "When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following the trust money but when as a matter of fact it cannot be traced, the equitable right of the *cestui que* trust to follow it fails. Under said circumstances, if the trustee has become bankrupt, the court cannot say that the trust money is to be found somewhere in the general estate of the trustee and still remains. He may have lost it with property of his own and in such case the *cestui que* can only come in and share with the general creditors."

In the case of *Worchester Bank & Trust Co., Trustee* v. *Robert A. Nordblom,* 285 Mass. 22-25, the court held as follows:

> "Apart from statute, in the distribution of the assets of an insolvent or deceased trustee, a claim based on the duty of the trustee or its breach is entitled to no priority because of its origin. Inherently a claim upon a grocery bill or promissory note ranks as high. It is only where some of the assets can be shown to be a part of the trust estate, or the product of the conversion of specific funds, or property of the trust estate into another form, that the trust estate can obtain an advantage over the creditors generally. That advantage is not a right to priority or preference but rather a right to reclaim assets of the trust estate that can be traced and found."

It would, therefore, appear from the cases cited that the court below has decided three important questions of general law in an untenable manner, in conflict with the weight of authority, which should be corrected by this Honorable Court.

III.

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF ILLINOIS IN BAYOR V. AMERICAN TRUST & SAVINGS BANK, 157 ILL. 62, AND COLEGROVE & CO. BANK V. GAUPP, 357 ILL. 499.

In holding that a constructive trust was created by the transactions between the Grigsby-Grunow Company and its employees the decision of the court below is in conflict with the decisions of the Supreme Court of Illinois.

In the case of *Susan M. Bayor* v. *American Trust & Savings Bank, Assignee,* 157 Ill. 62-68, the Supreme Court of Illinois held as follows:

> "Where the relation between the parties is primarily that of a debtor and creditor and there is a mere unperformed agreement on the part of the debtor to

create a specific fund which shall possess a separate identity, and to hold the same in trust, it would be illogical and inconsistant with these adjudications to hold that such a creditor occupies a stronger position than one who is primarily the beneficiary of a distinct and identified trust fund." (The trust fund referred to is one made by the assignment by the debtor of its assets to the American Trust & Savings Bank for the benefit of its creditors.)

In the case of *Colegrove & Co. Bank* v. *Gaupp*, 357 Ill. 499, the Supreme Court of Illinois held that to create a trust, there must be a *res* in existence upon which the trust can act, and the mere execution and delivery of a declaration of trust is not sufficient to create a trust if, in fact, no *res* exists upon which it may operate.

IV.

THE COURT BELOW HAS RENDERED A DECISION IN PROBABLE CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT IN CASES OF SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY V. R. B. CALDWELL, 67 F. 2D 802 (C. C. A. 8) AND BURTON COAL CO. V. FRANKLIN COAL CO. 67 F. 2D 796 (C. C. A. 8).

The effect of the decision of the court below is to allow a claim in a bankruptcy proceeding which clearly did not come within the classification of claims entitled to priority as established by Section 64 (b) of the Bankruptcy Act as amended. The claim also could not be sustained upon the theory of reclamation of property belonging to the claimant. Therefore, the decision must be said to rest upon general principles of equity jurisprudence.

In the case of *Burton Coal Co.* v. *Franklin Coal Co.* 67 F. 2d 796 (C. C. A. 8) the court held as follows (page 797):

"Some question is raised as to the equity jurisdiction of the Bankruptcy Court. That it is a court of

equity in the sense that its judges and referees in adjudging the rights of parties entitled to their decision are governed by principles and rules of equity jurisprudence, is beyond question. (Citing Cases.)

"It has not, however, plenary jurisdiction in equity but is confined in the application of the rules and principles of equity to the jurisdiction conferred upon it by the provisions of the Bankruptcy Act reasonably interpreted." (Citing Cases.)

"The plain mandate of the law cannot be set aside because of considerations which may appeal to the Referee or Judge as falling within general principles of equity jurisprudence."

In the case of *Southern Bell Telephone & Telegraph Company* v. *R. B. Caldwell*, 67 F. 2d 802 (C. C. A. 8) the claimant sought priority of payment on equitable grounds. The Referee in passing on the question held that Section 64 (b) is exclusive as to classes of debts which are entitled to priority of payment in advance of payment of dividends to creditors and that the petitioner's claim did not fall within any of the classes as set forth in said section. The Court of Appeals in said case sustained the contention of the Referee, citing with approval its former decision in *Burton Coal Co.* v. *Franklin Coal Co.* 67 F. 2d 796 (C. C. A. 8).

It is submitted that a conflict exists between the Seventh Circuit and the Eighth Circuit on this question which should be corrected by this Honorable Court.

Conclusion.

It is, therefore, respectfully submitted that this case calls for the exercise by this court of its supervisory powers to the end that the decision of the Circuit Court of Appeals, which is herein contended to be in conflict with applicable decisions of this court, and which has decided important questions of local and general law in a way

probably untenable or in conflict with the weight of authority of both the Federal and the State Courts, and which has decided an important bankruptcy question in a way so as to be contrary to the express provisions and intent of the Bankruptcy Act may be reviewed; and that to such an end a writ of certiorari be granted and this court review and reverse said decision of the Circuit Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
Counsel for Petitioner.

A. L. SCHAPIRO,
B. C. SCHIFF,
Of Counsel.